IN THE

Supreme Court of the United States

No. 486 OCTOBER TERM, 1967

J. DAVID STERN,

Petitioner,

v.

SOUTH CHESTER TUBE COMPANY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania, 252 F. Supp. 329, is printed at page 13a of the Joint Appendix filed in the court of appeals. The opinion of the court of appeals, 378 F.2d 205, is printed in the Appendix to the Petition at page 15.

JURISDICTION

The judgment of the court of appeals affirming the dismissal of petitioner's complaint by the district court

was entered on May 25, 1967. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Should certiorari be granted to reexamine the rule, established and consistently followed by this Court, that the United States District Courts lack jurisdiction to grant relief in the nature of mandamus against a private defendant if such an order is the only relief which the plaintiff seeks, when (1) there is no conflict of decisions concerning the rule, (2) Congress as recently as 1962 recognized the existence of the rule but enacted an amendatory statute limited to relief against federal officials and agencies, and (3) the instant case is one of a type which rarely occurs in the federal system and in which the plaintiff has available an adequate state remedy to attempt to establish his state-created right.

STATUTES INVOLVED

The case involves the interpretation of the All Writs Act, now codified as 28 U.S.C. § 1651(a) (1964):

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The All Writs Act as originally enacted, Section 14 of the Judiciary Act of 1789, 1 Stat. 81-82 (1845), provided that

> "all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias, habeas*

corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law".

Relevant to the interpretation of the All Writs Act is the section added to the Judicial Code by Public Law 87-748, 76 Stat. 744 (1962), 28 U.S.C. § 1361 (1964):

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The Federal Rules of Civil Procedure, the effect of which is not disputed in the instant case, provide in Rule 81(b):

> "The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

STATEMENT

Petitioner seeks review of the judgment of the court of appeals affirming an order of the district court dismissing his civil action in which jurisdiction was grounded on diversity of citizenship. Petitioner's sole request for relief was for an order to compel inspection of the records of the respondent, a private corporation organized under Pennsylvania law with its principal place of business in Pennsylvania and in which plaintiff, a citizen of New York, owns 62 of the 20,000 outstanding shares. Prior to dismissal of the complaint, a second shareholder, who was a citizen of Pennsylvania and represented by the same

counsel as petitioner, was allowed to intervene as a party plaintiff.

Respondent corporation filed an answer on the merits to petitioner's complaint and pleaded in addition that the district court lacked jurisdiction of the subject matter. The district court granted respondent's motion to dismiss on the ground that the court lacked jurisdiction to issue an order in the nature of a writ of mandamus when such an order is the only relief sought by the plaintiff. A decision was therefore unnecessary with respect to respondent's second jurisdictional issue concerning the absence of the jurisdictional amount.

During oral argument of petitioner's appeal it was suggested from the bench that diversity of citizenship was destroyed by the presence of the intervening plaintiff, a citizen of Pennsylvania; subsequently the court granted that plaintiff's motion, consented to by respondent, to withdraw from the litigation. The court then affirmed the dismissal by the district court, with one judge dissenting.

ARGUMENT

I. The decisions at all levels of the federal judicial system uniformly support the rule that a district court lacks jurisdiction to issue an order in the nature of mandamus in a diversity case to compel inspection of the records of a private corporation when that order is the only relief which the plaintiff seeks.

Petitioner cites no decisions at any level in conflict with the decision of the court of appeals because no such decisions exist.

Petitioner himself concedes the initial question as to the nature of the relief which he sought in the district court. Both opinions of the court of appeals (378 F.2d at 206, 207-08; Appendix to Petition, pp. 16, 18, 22), the opinion

of the district court, 252 F. Supp. at 331, and the petitioner (Petition, pp. 7-8) agree that the relief sought in the instant case is relief in the nature of an original writ of mandamus, regardless of whether the test of the nature of the remedy should be found in the general common law, *Rosen* v. *Alleghany Corp.*, 133 F. Supp. 858, 865 (S.D.N.Y. 1955), or the law of the state having jurisdiction over the corporation. *Newark Morning Ledger Co.* v. *Republican Co.*, 188 F. Supp. 813, 814 (D. Mass. 1960). As the district court correctly held, 252 F. Supp. at 331:

> "the question here is moot since both the Pennsylvania and the general common law remedy to compel the inspection of corporate records is mandamus."

The decisions have uniformly recognized that the United States District Courts lack jurisdiction of cases in which mandamus is the only relief sought by the plaintiff, absent a specific federal statute conferring such jurisdiction. This jurisdictional limitation arises from the language of the All Writs Act, Section 14 of the Judiciary Act of 1789, 1 Stat. 81-82 (1845), which provided that:

> "all the before-mentioned courts . . . shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, *which may be necessary for the exercise of their respective jurisdictions,* and agreeable to the principles and usages of law".* (Emphasis added.)

This Court held that an original action for mandamus does not create such necessity, since the writ would be necessary

> "Not because that Court possesses jurisdiction, but

* As now codified, 28 U.S.C. § 1651(a) (1964), the All Writs Act states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

> because it does not possess it . . . The 14th section of the act under consideration, could only have been intended to vest the power now contended for, in cases where the jurisdiction already exists, and not where it is to be courted or acquired, by means of the writ proposed to be sued out." *McClung* v. *Silliman*, 6 Wheat. 598, 601-02.

Since that time, the law has been "well established that a United States district court, outside of the District of Columbia, does not have jurisdiction to issue the writ of mandamus." *United States ex rel. Barmore* v. *Miles*, 177 F. Supp. 172, 173 (W. D. Mich. 1959). The courts of the District of Columbia, having all the common law powers of courts of general jurisdiction of the State of Maryland as of 1801, are unique in having the power to issue an original mandamus. *Kendall* v. *United States*, 12 Pet. 524, 622-25.

This Court has adhered to the rule through successive changes in the wording of the original Judiciary Act. In *Knapp* v. *Lake S. & M. S. Ry.*, 197 U.S. 536, the Court rejected an argument that a change in the doctrine was required either by changes in the language of the jurisdictional statutes or "in view of the modern development of proceedings by mandamus, and the very great importance of the remedy thereby." 197 U.S. at 541. Since both the adoption in 1937 of Fed. R. Civ. P. 81(b) and the 1948 revision of the Judicial Code, "the courts have adhered to the view that Congress has not vested in the district courts original jurisdiction in cases of mandamus, without any suggestion that the revised jurisdictional phraseology wrought any change." *Marshall* v. *Crotty*, 185 F.2d 622, 627 (1st Cir. 1950).

Furthermore, the courts have consistently held that a district court could not "make a writ of injunction serve the purpose of a writ of mandamus. . . . What the court

was without the power to do directly, it was without the power to do indirectly." *Fineran* v. *Bailey*, 2 F.2d 363 (5th Cir. 1924).

The absence of jurisdiction in a United States District Court to issue an order to compel inspection of corporate records has been recognized in all diversity actions involving facts similar to those of the instant case. *E.g., Newark Morning Ledger Co.* v. *Republican Co.*, 188 F. Supp. 813, 814 (D. Mass. 1960); *Selman* v. *Colborn*, 143 F. Supp. 112, 113 (S.D.N.Y. 1956); *Rosen* v. *Alleghany Corp.*, 133 F. Supp. 858, 864-65 (S.D.N.Y. 1955); *Breswick & Co.* v. *Briggs*, 136 F. Supp. 301, 303-04 (S.D.N.Y. 1955).

In each of those cases, the plaintiff sought an order to compel inspection of corporate records of the defendant. In each case, the court determined that the order requested was in the nature of a writ of mandamus. In each case the court then denied relief on the ground that a United States District Court lacked jurisdiction to issue an order. *Accord, Wilder* v. *Brace*, 218 F. Supp. 860, 863 (D. Me. 1963) (dictum); *Greenough* v. *Independence Lead Mines Co.*, 45 F.2d 659, 660 (N.D. Idaho 1930) (alternative holding).

Both petitioner and the dissenting judge below appear to agree that no conflict of decisions exists. The dissenting judge suggests, however, that another decision of the same district court, *Susquehanna Corp.* v. *General Refractories Co.*, 250 F. Supp. 797 (E.D. Pa. 1966), might indicate a different result. But even if the dicta in that decision are read broadly, no conflict exists. The District Judge deciding the instant case carefully considered and distinguished the *Susquehanna Corp.* decision, which had been reviewed and modified by the court of appeals less than a month before his decision entered in the instant case. See 252 F. Supp. at 332. The appeal from the district court in the *Susquehanna Corp.* case was heard by a panel which included Circuit Judge Freedman, who concurred in the *per curiam*

affirmance of the "basic position" of the district court, with certain modifications as to the relief to be granted. 356 F.2d 985 (3d Cir. 1966). Judge Freedman also heard the instant case and also concurred in the opinion of the court.

There is, therefore, no conflict of decisions which would justify certiorari in the instant case.

II. Congress has repeatedly recognized and confirmed this Court's limitation on district court jurisdiction in mandamus, most recently in 1962 when both Houses explicitly referred to the rule but created new jurisdiction only with respect to relief against federal officials.

Congress has long recognized and acquiesced in the consistent judicial interpretation of the All Writs Act to exclude district court jurisdiction of original actions in the nature of mandamus. When Congress has desired that original mandamus be available to litigants, the grant of jurisdiction to the district courts has been narrowly framed to deal with specific rights and specific classes of cases.

For example, no general mandamus jurisdiction has been created with respect to rights and obligations under the Interstate Commerce Act. Instead, Congress has at various times provided that the "district courts of the United States shall have jurisdiction . . . to issue a writ or writs of mandamus" to enforce various parts of the Act. Compare the following sections of the Interstate Commerce Act: (1) 25 Stat. 855, 862 (1889), as amended, 56 Stat. 301 (1942), 49 U.S.C. § 23 (1964), creating district court "jurisdiction . . . to issue a writ or writs of mandamus" to command carriers to provide equal facilities to shippers; (2) 34 Stat. 584, 594-95 (1906), as amended, 49 Stat. 543 (1935), 49 U.S.C. § 20(9) (1964), creating district court "jurisdiction . . . to issue a writ or writs of manda-

mus" to enforce "this chapter" of the Act*; and (3) 37 Stat. 701, 703 (1913), as amended, 41 Stat. 493 (1920), 49 U.S.C. § 19a(*l*) (1964), creating district court "jurisdiction . . . to issue a writ or writs of mandamus" commanding compliance "with the provisions of this section."

Congress has also reenacted Section 14 of the original Judiciary Act, with various changes in phraseology and some changes in substance, but without attempting to change this Court's interpretation of the limitations on original jurisdiction in mandamus. Compare the original section, 1 Stat. 81-82 (*supra* at p. 2); with Rev. Stat. § 716 (1875); and 36 Stat. 1162 (1911); and the present 28 U.S.C. § 1651(a); see Reviser's Note to 28 U.S.C. § 1651 (1964). These reenactments bring the All Writs Act squarely within the class of statutes which Congress has amended without amending a particular section, thus requiring the courts to "assume that it has been satisfied with, *and adopted*, the construction given to its enactment by the courts." *Electric Storage Battery Co.* v. *Shimadzu*, 307 U.S. 5, 14. (Emphasis added.)

Furthermore, Congress as recently as 1962 has specifically considered the rule laid down in the prior decisions and has determined to amend the Judiciary Act only with respect to jurisdiction in mandamus against federal officers and agencies. Congress and the Judicial Conference of the United States recognized that the limitation of mandamus jurisdiction to the district courts of the District of Columbia acted as an inconvenience to private litigants seeking relief against actions of the federal Government. By Public Law 87-748, 76 Stat. 744 (1962), 28 U.S.C. § 1361 (1964), Congress provided that:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an

* The words "said Act" in 34 Stat. 594-95 were changed to "this part" by 49 Stat. 543; the editors of the United States Code have "translated" the words "this part" to read "this chapter." See Historical Note to 49 U.S.C.A. § 20, par. (9) (1951).

officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Under this section, orders in the nature of mandamus may be granted against officers of the United States by any district court.

Prior to the enactment of this amendment, both Houses recognized the limitations upon the mandamus jurisdiction. The report of the House Judiciary Committee, H.R. Rep. No. 536, 87th Cong., 1st Sess. (1961), to accompany H.R. 1960, which became Public Law 87-748, stated at page 2:

> "unless jurisdiction is otherwise acquired, the U.S. district courts have long disclaimed jurisdiction to hear petitions for mandamus. Nor has the abolition of mandamus by rule 81(b) of the Federal Rules of Civil Procedure altered this jurisdictional limitation, since the Federal rules did not change either the substance of the relief which the district courts could grant or the cases over which they had jurisdiction.
>
> "The single exception to the general proposition that the U.S. district courts do not have jurisdiction over original actions for mandamus is the U.S. District Court for the District of Columbia."

Similar language appears in Senate Report No. 1992, 87th Cong., 2d Sess. 2 (1962), reprinted 1962 U.S.C. Cong. & Admin. News 2784, 2785.

The long and consistent legislative history of specific enactments to create district court jurisdiction in mandamus establishes that the rule declared by this Court has been confirmed by Congress. Under these circumstances, that jurisdiction should not be expanded except by statute, enacted after appropriate consultation and deliberation by both the Judicial Conference, pursuant to the mandate

of 28 U.S.C. § 331 (1964), and the responsible Congressional committees.

III. The limitation has no significant impact on most diversity litigation involving corporations and those few cases in which relief may be obtained only in the state courts are the cases most appropriately disposed of by those courts.

Petitioner makes no argument that review should be granted because the rule adopted by this Court and followed by the court of appeals has any significant impact on cases other than this one.

In any event, the instant case is one of those very few involving shareholders' rights in which the limitation on mandamus jurisdiction has any effect.

In those cases in which the complexity of the litigation might perhaps be said to justify federal jurisdiction, typically cases involving mergers of corporations operating in different states, federal causes of action are generally asserted under the federal securities acts or the federal anti-trust laws; orders in the nature of mandamus, even if necessary to supplement discovery under the Federal Rules of Civil Procedure, are in such cases ancillary to the exercise of jurisdiction otherwise acquired. Even if the plaintiffs in such a case rely only on state-created causes of action, orders in the nature of mandamus will frequently be proper as ancillary to the district court's general powers of equitable intervention, as in *Susquehanna Corp.* v. *General Refractories Co.*, 250 F. Supp. 297 (E.D. Pa.), *modified*, 356 F.2d 985 (3d Cir. 1966).

The only cases involving shareholders' rights in which the absence of jurisdiction is likely to have an effect are those in which the plaintiff seeks nothing but the bare enforcement of a state-created right, such as the inspection of corporate records sought in the instant case.

Such cases are exactly the cases which, in a rational allocation of judicial business between the federal and state courts, would most reasonably be left to the state courts. This is particularly the case when, as here, the parties are in dispute both as to issues of law involving the scope of the inspection allowed by the state corporation statutes and issues of fact, including the good faith of the petitioner in seeking inspection.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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